ORIGINAL

Supreme Court, U.S.
FILED
SEP 15 2004
OFFICE OF THE CLERK

No. 03-9627

IN THE SUPREME COURT OF THE UNITED STATES

JOHN A. PACE,

Petitioner,

v.

DONALD VAUGHN, et al.,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals for the Third Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

BILLY H. NOLAS, ESQ.
Assistant Federal Defender
MAUREEN KEARNEY ROWLEY, ESQ.
Chief Federal Defender
Defender Association of Philadelphia
Federal Court Division
The Curtis Center – Suite 545 West
Independence Square West
Philadelphia, PA 19106
(215) 928-0520

Counsel for Petitioner, John Pace

Dated: September 15, 2004

RECEIVED
SEP 20 2004
OFFICE OF THE CLERK
SUPREME COURT, U.S.

TABLE OF CONTENTS

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

ARGUMENT 1

I. THE COMMONWEALTH IS WRONG ON STATUTORY TOLLING. 1

II. THE COMMONWEALTH IS WRONG ON EQUITABLE TOLLING. 3

CONCLUSION 6

TABLE OF AUTHORITIES

Federal Cases

Artuz v. Bennett, 531 U.S. 4 (2000) 1

Carey v. Saffold, 536 U.S. 214 (2002) 1, 2

Dixon v. Cain, 316 F.3d 553 (5th Cir. 2003) 2

Grillette v. Warden, 372 F.3d 765 (5th Cir. 2004) 2

Keenen v. Bagley, 262 F.Supp.2d 818, 822-23, 826 (N.D. Ohio 2002) 3

Lesko v. Owens, 881 F.2d 44 (3d Cir. 1989) 5

McKeithen v. Varner, 2004 WL 1920957 (3d Cir. Aug. 30, 2004) 5, 6

Rouse v. Lee, 339 F.3d 238 (4th Cir. 2003) 2

Schlueter v. Varner, — F.3d —, 2004 WL 2035180 (3d Cir. Sept. 14, 2004) 5

Siebert v. Campbell, 334 F.3d 1018 (11th Cir. 2003) 3

Wade v. Battle, — F.3d —, 2004 WL 1764054 (11th Cir. Aug. 6, 2004) 3

State Cases

Commonwealth v. Albert, 561 A.2d 736 (Pa. 1989) 5

Commonwealth v. Albrecht, 720 A.2d 693 (Pa. 1998) 5

Petitioner, John Pace, respectfully asks that the Court issue its writ of certiorari to review the decision of the United States Court of Appeals for the Third Circuit regarding statutory and equitable tolling of the AEDPA statute of limitations.[1] Petitioner files this short reply to the Commonwealth's Brief in Opposition.

ARGUMENT

I. THE COMMONWEALTH IS WRONG ON STATUTORY TOLLING.

The Commonwealth does not contest Petitioner's showing that the question reserved in Artuz v. Bennett, 531 U.S. 4, 8 n.2 (2000) – "whether the existence of certain exceptions to a [state court] timely filing requirement can prevent a late [state court] application from being considered improperly filed" – has created a Circuit split. See Petition for Writ of Certiorari § I. Instead, the Commonwealth claims that Carey v. Saffold, 536 U.S. 214 (2002) answered Artuz's reserved question about the meaning of "properly filed."

The Commonwealth's claim that Saffold decided the "properly filed" issue reserved by Artuz is wrong for the reasons stated the Petition for Writ of Certiorari – e.g., the words "properly filed" do not appear in the Saffold Court's opinion; the Saffold Court's opinion does not cite Artuz; and the Saffold briefs explicitly note that the meaning of "properly filed" was not before this Court.

After Saffold, as before, there is a split between the Courts of Appeal on the question reserved by Artuz. In the Third, Sixth and Seventh Circuits, a state post-conviction petition ruled "untimely" by the state courts is never "properly filed" for federal purposes. See Petition for Writ of Certiorari §§ I.B, II.A (discussing Third and Seventh Circuit cases); Brief in Opposition at 12 n.11 (citing Sixth Circuit decisions). In the Second, Fifth, Ninth and Eleventh Circuits, an state post-conviction ruled "untimely" by the state courts can be deemed "properly filed" for federal purposes. See Petition for Writ of Certiorari §§ I.A, II.B (discussing Second, Fifth, Ninth and Eleventh Circuit cases).[2]

The Commonwealth, citing Grillette v. Warden, 372 F.3d 765 (5th Cir. 2004), suggests that Saffold has caused the Fifth Circuit to reevaluate its "properly filed" precedent. Brief in Opposition at 14 & n.14. The Commonwealth's claim is remarkably wrong. In Grillette, the Fifth Circuit applied Saffold to the issue that Saffold actually decided – whether a state post-conviction application was "pending" during a gap between upper and lower state court proceedings. As to "properly filed," Grillette explicitly reaffirmed the Fifth Circuit's rule (described in the Petition for Writ of Certiorari) that untimely state post-conviction applications may nevertheless be "properly filed":

> [T]he State argues that because Grillette's June 8, 2000, application for supervisory writs was filed after the 30-day deadline imposed by Rule 4-3, the application was not "properly filed" ... under § 2244(d)(2). This argument, however, is foreclosed by our [prior] decision[s] ..., in which we held that **an application that is untimely under Louisiana Courts of Appeal Rule 4-3 is nevertheless "properly filed"** because Rule 4-3's deadline is not without exceptions .... The only question for our consideration on appeal, therefore, is whether Grillette's state habeas application remained "pending" under § 2244(d)(2) and therefore tolled the limitations period during the interval between the trial court's denial of Grillette's state habeas application and his filing, nearly thirteen months later, of his supervisory writ application to the Louisiana Court of Appeal.

Grillette, 372 F.3d at 770 n.5.[3] After Saffold, as before, the Fifth Circuit rule is that "untimely" state post-conviction applications may be "properly filed."

---

[1] All emphasis herein is supplied unless otherwise indicated. Respondents are referred to as "the Commonwealth."

[2] The Commonwealth, citing Rouse v. Lee, 339 F.3d 238 (4th Cir. 2003) (en banc), suggests that the Fourth Circuit is in the same "properly filed" camp as the Third, Sixth and Seventh Circuits. See Brief in Opposition at 12-13 & n.12. Actually, Rouse did not address the "properly filed" issue – it found "there is no question that Rouse's [state post-conviction application] was 'properly filed'"; and held that the state post-conviction application ceased to be "pending" when the state's highest court denied relief, state court rules did not allow an application for rehearing, and Rouse did not actually seek rehearing. Id., 339 F.3d at 244-45. To the best knowledge of undersigned counsel, the Fourth Circuit has not decided the "properly filed" issue presented herein.

[3] The Commonwealth also cites Dixon v. Cain, 316 F.3d 553 (5th Cir. 2003), see Brief in Opposition at 14 n.14, which did not address "properly filed" and, instead, considered only whether a state post-conviction application was "pending" during a gap in the state court proceedings.

The Commonwealth suggests that the Eleventh Circuit precedent cited by Petitioner, Siebert v. Campbell, 334 F.3d 1018 (11th Cir. 2003) (untimely state post-conviction application was "properly filed"), is "at best unclear." Brief in Opposition at 13. But there is noting "unclear" about Siebert's ultimate conclusion – Siebert holds that an untimely state post-conviction application is "properly filed." To the extent that Siebert's discussion is "unclear," it confirms the need for this Court's review and clarification of these questions.

The Commonwealth also claims that a recent Eleventh Circuit decision, Wade v. Battle, — F.3d —, 2004 WL 1764054 (11th Cir. Aug. 6, 2004), "suggests a lack of confidence" in Siebert. Brief in Opposition at ~~13 &~~ n.13. There is no basis in Wade for the Commonwealth's assertion – Wade recognizes Siebert as controlling authority in the Eleventh Circuit.

Even the cases cited by the Commonwealth recognize that the Circuits are split on the "properly filed" issue, and that the Third/Sixth/Seventh Circuit approach creates "unfair" and "draconian" results. Keenen v. Bagley, 262 F.Supp.2d 818, 822-23, 826 (N.D. Ohio 2002) (cited in Brief in Opposition at 12 n.11).

This Court should grant the writ and decide this important issue for all the reasons stated herein and in the Petition for Writ of Certiorari.

II. THE COMMONWEALTH IS WRONG ON EQUITABLE TOLLING.

As discussed in the Petition for Writ of Certiorari § IV, the Third Circuit's narrow view of "properly filed," which requires the denial of statutory tolling whenever the state court deems the state proceedings untimely, is especially unfair because it is combined with a harsh approach to equitable tolling, which denies equitable tolling in cases, like this, where the petitioner acted "appropriately," "diligently," and "reasonably" in seeking state court remedies at a time when they appeared to be available, and when seeking such state court remedies was required by Third Circuit precedent regarding exhaustion of state remedies.

The Commonwealth tries to recast the equitable tolling issue as being about "ignorance of

the law," and cites cases holding that mere "legal mistakes" do not justify equitable tolling. Brief in Opposition at 15-20. The Commonwealth's argument and cases, however, are inapposite. This is not a case where the petitioner just made a "mistake" out of "ignorance of the law." Instead, this is a case where the petitioner did what Third Circuit exhaustion law at the time required him to do – he pursued state court remedies that the Third Circuit had held appeared to be available and that would-be habeas petitioners must exhaust before seeking federal review.

The Commonwealth also says Petitioner should not be afforded equitable tolling because his PCRA proceedings (where he sought to exhaust state remedies) supposedly did not raise any new claims that had not already been exhausted in his prior PCHA proceedings (where he litigated his first state post-conviction petition). See Brief in Opposition at 4-5, 15-16.

The Commonwealth's claim is frivolous. The District Court carefully reviewed the record in this case and determined that the PCRA proceedings raised claims that were not presented in the prior PCHA proceedings. The District Court is right. Petitioner's PCRA proceedings clearly raised at least one entirely new federal constitutional claim that was not raised in his PCHA proceedings – the claim that a sentence of life imprisonment without parole is illegal and violates due process and the Eighth Amendment when imposed for a crime other than first-degree murder or second-degree arson-murder.[4]

---

[4] See, e.g., A83 (PCRA Superior Court opinion describing one of the PCRA claims as being that "the imposition of a life sentence without eligibility for parole was illegal"); A73, PCHA Superior Court opinion (describing issues presented, which do not include this illegal sentence issue); SA61-62, *Petitioner's Objections to Magistrate Judge's Report and Recommendation* at 12-13 (describing different claims raised in PCHA and PCRA proceedings; illegal sentence claim not raised in PCHA proceedings). In its Third Circuit brief, the Commonwealth admitted that the "PCRA proceedings "added a new claim challenging the legality of a life sentence without parole," but asserted that this claim was actually "adjudicated" in the prior PCHA proceedings. Pace v. Vaughn, No. 02-3049, Brief for Appellants at 61 n.19 (3d Cir. Sep. 30, 2002) (citing PCHA Superior Court opinion, A71-76). The Commonwealth is wrong. Nothing in the PCHA Superior Court's opinion suggests that it adjudicated this claim, which was not raised in the PCHA proceedings. The part of the PCHA Superior Court opinion cited by the Commonwealth simply says that "life imprisonment" in Pennsylvania means life without parole – the opinion does not address the question of whether this fact about life imprisonment renders such a sentence illegal under certain

Moreover, even if the PCRA proceedings had not raised an entirely new claim, it was appropriate for Petitioner to seek PCRA relief for another reason – to exhaust additional facts in support of his other claims, as required by Third Circuit law. See Lesko v. Owens, 881 F.2d 44, 50 (3d Cir. 1989) ("Both the legal theory and the facts supporting a federal claim must have been submitted to the state courts."). Petitioner's PCRA proceedings asserted, inter alia, that his court-appointed PCHA counsel had been ineffective for failing to subpoena and call his guilty-plea counsel at the PCHA hearing. In Pennsylvania, there is "an enforceable right to effective post-conviction counsel," Commonwealth v. Albrecht, 720 A.2d 693, 700 (Pa. 1998), "at both the hearing and appellate levels" and, when post-conviction counsel's "representation is deemed to be inadequate, it is inappropriate to allow the proceedings in which it was rendered to be binding upon the defendant's rights," Commonwealth v. Albert, 561 A.2d 736, 738 (Pa. 1989). Thus, if the state courts had not deemed Petitioner's PCRA claim untimely, an appropriate remedy for PCHA counsel's ineffectiveness would have been to allow Petitioner a hearing at which he could present the evidence that effective PCHA counsel would have presented, including the testimony of trial counsel who misled Petitioner as to the actual result of a guilty plea. The Commonwealth would penalize Petitioner for trying to exhaust all the facts, as required by the exhaustion requirement.

Federal judges have recognized the unfairness of the Third Circuit's equitable tolling law. For example, in Schlueter v. Varner, — F.3d —, 2004 WL 2035180, *8, *10-*11 (3d Cir. Sept. 14, 2004), Third Circuit Judge Ambro dissented from the denial of equitable tolling, described the majority's denial of tolling as "**unfair**" and causing "**fundamental inequity**," and noted that "**[o]ther courts [of appeal] have applied equitable tolling** under circumstances" where the Third circuit denies it. Similarly, in McKeithen v. Varner, No. 02-1913, 2004 WL 1920957 (3d Cir. Aug. 30, 2004) (unpublished, text on Westlaw), Senior District Judge Oberdorfer, United States District Court for the District of Columbia, sitting by designation on a Third Circuit panel, "has written a

---

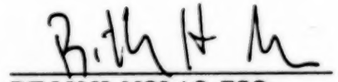
circumstances, which was the claim Petitioner raised for the first time in the PCRA proceedings.

powerful dissent," id. at *3 n.3 (majority), criticizing the Third Circuit's "**unfair** and **legally unnecessary**" approach to equitable tolling, id., at *4 (dissent). This Court should grant the writ and review the Third Circuit's decision.

CONCLUSION

For the reasons stated in the Petition for Writ of Certiorari and above this Court should grant the writ and review the decision of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,



BILLY H. NOLAS, ESQ.
Assistant Federal Defender
MAUREEN KEARNEY ROWLEY, ESQ.
Chief Federal Defender
Defender Association of Philadelphia
Federal Court Division
The Curtis Center – Suite 545 West
Independence Square West
Philadelphia, PA 19106
(215) 928-0520

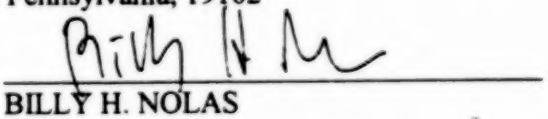
Counsel for Petitioner, John Pace

Dated: September 15, 2004

CERTIFICATE OF SERVICE

I, BILLY H. NOLAS, certify that on this 15th day of September, 2004, I have caused the foregoing reply brief to be served by FIRST CLASS MAIL on the following person:

Ronald Eisenberg
Office of the Philadelphia District Attorney
1421 Arch Street
Philadelphia, Pennsylvania, 19102



BILLY H. NOLAS